

17-269 WASHINGTON V. UNITED STATES

DECISION BELOW: 853 F.3d 946

LOWER COURT CASE NUMBER: 13-35474

QUESTION PRESENTED:

In a series of treaties, the federal government promised northwest Indian tribes "[t]he right of taking fish, at all usual and accustomed grounds and stations ... in common with all citizens." This Court has held that this language guarantees the tribes "a fair share of the available fish," meaning fifty percent of each salmon run, revised downward "if tribal needs may be satisfied by a lesser amount." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 685 (1979).

In this case, the Ninth Circuit held that the treaties instead guaranteed "that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes." App. 94a. On that basis, the panel held that the treaties require Washington to replace culverts under state roads that restrict salmon passage. The court ordered the State to replace hundreds of culverts, at a cost of several billion dollars, even though it is undisputed that: (1) the federal government-the lead Plaintiff-specified the design and granted permits for the overwhelming majority of culverts at issue; and (2) many culvert replacements will have no benefit for salmon because of other non-State owned barriers to salmon on the same streams.

The questions presented are:

1. Whether the treaty "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens" guaranteed "that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes."
2. Whether the district court erred in dismissing the State's equitable defenses against the federal government where the federal government signed these treaties in the 1850's, for decades told the State to design culverts a particular way, and then filed suit in 2001 claiming that the culvert design it provided violated the treaties it signed.
3. Whether the district court's injunction violates federalism and comity principles by requiring Washington to replace hundreds of culverts, at a cost of several billion dollars, when many of the replacements will have no impact on salmon and Plaintiffs showed no clear connection between culvert replacement and tribal fisheries.

CERT. GRANTED 1/12/2018